

1 Law Offices
2 **HINSHAW & CULBERTSON LLP**
3 3200 N. Central Avenue
4 Suite 800
5 Phoenix, AZ 85012
6 602-631-4400
7 602-631-4404
8 vorze@hinshawlaw.com

9 Victoria L. Orze (011413)
10 Attorneys for Defendant

11 UNITED STATES DISTRICT COURT

12 DISTRICT OF ARIZONA

13 Bryan Nichols,
14 Plaintiff,

15 vs.

16 GC Services, LP,
17 Defendant.

No. CV 08-1491-PHX-FJM

**RESPONSE TO PLAINTIFF'S
MOTION FOR
SUMMARY JUDGMENT**

18 Defendant GC Services, LP ("GC"), through undersigned counsel, hereby
19 responds to Bryan Nichols' ("Plaintiff") motion for summary judgment. The Plaintiff's
20 motion should be denied because its allegations and accompanying statement of facts are
21 inconsistent with the evidence of record, and in fact, the motion demonstrates that
22 Plaintiff cannot support his claims with competent evidence such that summary judgment
23 should be granted in Defendant's favor.

24 This Response is supported by Defendant's separate Objections to Plaintiff's
25 Statement of Facts (filed herewith), the Defendant's Statement of Facts in support of its
26 own summary judgment motion, Defendant's own Motion for Summary Judgment, and
the following Memorandum of Points and Authorities.

I. INTRODUCTION

The Plaintiff's motion seeks summary judgment on five alleged violations of the
Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p ("FDCPA"), in connection

1 with collection activity undertaken by GC against the Plaintiff to recover on a student
 2 loan taken out by Plaintiff from the Department of Education.¹ For the purposes of this
 3 motion, GC admits that the FDCPA applies to the present dispute, in that the Plaintiff is a
 4 “consumer” as defined by the FDCPA, GC is a “debt collector” as defined by the
 5 FDCPA, and the Plaintiff’s obligation is a “debt” as defined by the FDCPA.

6 It should be clear from his motion that the Plaintiff has not and cannot support his
 7 FDCPA case with competent, admissible evidence. Moreover, the Plaintiff cannot
 8 controvert the evidence of record presented by Defendant GC, which demonstrates
 9 compliance with the FDCPA. The Plaintiff’s motion should be denied and Defendant’s
 10 cross-motion granted.

11 **II. LEGAL ARGUMENT**

12 **A. There is no evidence in the record that Defendant threatened to take** 13 **unlawful action or that GC falsely represented that it or the creditor** 14 **would take action when it had no intention to.**

15 The Plaintiff claims that GC violated § 1692e(5) by threatening to take action
 16 against him that could not legally be taken. There is no evidence of record that GC made
 17 any such threats, that it represented it would take action it did not intend to take, or that
 18 GC communicated to Plaintiff it would take action that it could not take.

19 Mr. Nichols’ did not testify in his deposition and did not offer any affidavit
 20 testimony where he recalled any improper threats or communications made by the
 21 Defendant. When posed interrogatories asking him to divulge any details of such
 22 unlawful communications, the Plaintiff admitted that he was unable to identify any such
 23 communications until he first reviewed GC’s collection notes. *See Exhibit B to*
 24 *Defendant’s Motion for Summary Judgment at page 6, lines 1 through 13, and Exhibit B*

25 ¹ With respect to the loan itself, Plaintiff alternates between disputing he ever took it out and claiming he does not
 26 remember ever having done so.

1 thereto, which is Plaintiff's Answers and Supplemental Answers to Defendant's
2 Interrogatories.

3 The Plaintiff's deposition testimony confirmed that he could not remember any
4 details about discussions he had with GC collectors on the telephone. For example, Mr.
5 Nichols was asked what he remembered about his first discussion with GC, and he
6 answered "As I recall, there was a call; I asked what it was in reference to; they stated a
7 figure and, "What is you" - - "How do you intend to pay? Can you write a check?"
8 Something of that nature." Nichols Deposition at 18:7-13.

9 Nonetheless, in support of his motion on this claim, Plaintiff points to two entries
10 in Defendant's Account Detail Listing in which Plaintiff was given standard-form
11 information regarding wage garnishment, treasury offset, and litigation as possible
12 consequences of failure to repay debt obligations. Nothing in the notes themselves
13 establish that GC made improper threats or representations. *See* Defendant's Response to
14 PSOF at ¶47.

15 Rather than evidencing improper communications, the collection notes and Mr.
16 Grover's testimony demonstrate that GC properly and accurately advised Mr. Nichols of
17 the real and lawful potential consequences of his failure to resolve the account. *See*
18 Defendant's Response to Plaintiff's Statement of Facts at ¶¶33, 34, and 41. Paul Grover
19 testified (correctly) that the FDCPA prohibits debt collectors from representing that they
20 are going to take action that they cannot or do not plan to take. He explained that GC
21 informed Mr. Nichols correctly what the Department of Education could lawfully do, and
22 might in fact do, if the account was not resolved – and that the Department of Education,
23 not GC, would make that determination in its own discretion. Defendant's Response to
24 PSOF at ¶35 and ¶41.

25 Nor do the letters GC sent to Plaintiff communicate any improper threats. To the
26 contrary, Letters 30A, 30W, and 30B explicitly inform Mr. Nichols of the potential

1 consequences of his remaining in default – and not that GC would take any action. *See*
 2 Grover Affidavit filed with Defendant’s MSJ, Exhibit G-1, G-2, and G-3. The
 3 information imparted to Plaintiff in the letters regarding the potential consequences was
 4 true: the Department of Education is legally authorized to levy an administrative wage
 5 garnishment against student loan defaulters, it is legally authorized to confiscate tax
 6 refunds for debtors in default, and it is legally authorized to sue such debtors.

7 The Plaintiff has not and cannot controvert what the notes say. He has not
 8 presented any evidence to establish improper communications in violation of § 1692e(5).
 9 Mr. Nichols’ motion on this claim should be denied, and the Defendant’s should be
 10 granted.

11 **B. Plaintiff has not established that he advised the Defendant to cease and**
 12 **desist communicating with him at work at any time before June 27,**
 13 **2008, and he has not established that GC contacted him at work after**
 14 **he told it not to.**

15 The Plaintiff alleges that GC violated § 1692c(a) by calling his place of
 16 employment after knowing or having reason to know that the employer prohibits its
 17 employees from receiving such communication. There is no evidence in the record that
 18 Mr. Nichols’ employer, Granberry Supply, has or had a policy prohibiting its employees
 19 from personal use of the telephone. Plaintiff’s employer did not have such a policy, so
 20 GC Services obviously had “no reason to know” that the employer imposed such a
 21 restriction.

22 Although the Account Detail Listing provides specific details of discussions GC’s
 23 collectors had with Mr. Nichols, the Listing shows that it was only on June 27, 2008 that
 24 Mr. Nichols, for the first time, told GC he did not want calls at his place of employment
 25 any longer. (*See* Account Detail Listing page 8, 6-27-08 (11:27 entry)). The collection
 26 notes establish (and Plaintiff has not controverted) that GC immediately thereafter
 removed Mr. Nichols’ employment contact number from his records and noted in his

1 account that there were to be no more calls to his place of employment. There is no
2 evidence in the Account Detail Listing, or anywhere else in the record, that GC contacted
3 Plaintiff at work after June 27, 2008. In fact, the Account Detail Listing shows that no
4 calls were placed to Plaintiff after June 27, 2008.

5 Moreover, the Account Detail Listing indicates that it was only on July 8, 2008,
6 that Defendant received written correspondence on behalf of Plaintiff – that being his
7 lawyer’s July 1, 2008 letter. The letter claims only that GC communicated with Mr.
8 Nichols after Mr. Nichols told him GC’s calls were “inconvenient.” (See Account Detail
9 Listing page 9, 7-08-08 (9:06 entry)). The statute prohibits calls to the place of
10 employment with knowledge that they are prohibited by the employer, not merely when
11 such calls might be “inconvenient.”

12 The evidence of record on this alleged violation does not favor Plaintiff’s motion.
13 Mr. Nichols has not presented any evidence that establishes he told the Defendant, at any
14 time before June 27, 2008, not to contact him at work. The collection notes show that
15 GC did not contact him at work at any time after June 27, 2008, and that GC got a cease
16 and desist letter from Plaintiff only on July 8, 2008. These facts are not disputed.
17 Summary judgment should be entered in Defendant’s favor on this claim.

18 **C. Plaintiff has not established that GC had improper communications**
19 **with any third persons in violation of § 1692c(b).**

20 The Plaintiff claims that collectors from GC Services had unauthorized
21 communications with all manner of third-parties about his defaulted student loan. The
22 FDCPA, at § 1692c(b), does prohibit debt collectors from communicating with third-
23 parties about a consumer’s debt, except to obtain location information, but the Plaintiff
24 has not disclosed or produced any credible evidence of such improper contact.

25 On December 3, 2008, GC asked Mr. Nichols in an interrogatory to identify all
26 third-parties he contends GC improperly communicated with regarding his student loan:

1 INTERROGATORY 2. State the date, time, mode of communication, substance of
2 communication, and person(s) communicated with, for each instance in which you claim
3 Defendant communicated with Plaintiff or Plaintiff's family members, in violation of the
4 FDCPA.

5 Mr. Nichols responded on January 19, 2009, as follows:

6 "ANSWER: See Objection to Interrogatory #1." That objection reads:

7 [OBJECTION] Plaintiff is unable to answer this question thoroughly because Plaintiff
8 does not possess detailed records of Defendant's activities. Plaintiff's allegations are
9 based on direct experience of specific events. Plaintiff did not expect to need to document
10 Defendant's activities in a detailed manner and does not regularly document his activities
11 with other agencies in his daily life. Defendant is presume to have a detailed record of its
12 debt collection activities that could provide an answer to this question. Plaintiff is in
13 possession of Defendants' collection record, but code is used in the record and therefore
14 the record must be deciphered before use in answering this interrogatory. Please see
15 Plaintiff's Rule 26 Disclosure Statement, Defendant's Rule 26 Disclosure Statement,
16 Plaintiff's Complaint, Defendant's Answer, Defendant's discovery responses, the
17 deposition of Defendant, and any other disclosures by either party already made or yet to
18 be made. Plaintiff will seasonably supplement all disclosures if new information is
19 obtained.

20 *See* Defendant's Exhibit B to Statement of Facts in Support of its MSJ.

21 Mr. Nichols' initial answer to Interrogatory #2 went on to refer GC to his answer
22 to Interrogatory #7, which identified Pam and Phil Mink and Glen Nichols, at 1041 West
23 Harvest in Mesa, giving their telephone number as 480-962-5340, Jasmine Zummallen,
24 telephone number 480-233-3772, and Plaintiff's son Jordan Nichols (age 10), with an
25 unknown phone number.

26 By this answer, Plaintiff admitted that he did not know when he filed his lawsuit,
and did not know by the time he answered discovery, if GC made any unauthorized
contact with third parties in violation of the Act. He could not identify any specifics
about such communications, including what was said, by whom, or when such contacts
took place.

Thereafter, Defendant deposed Pam Mink, Plaintiff's mother. She testified that
she received numerous, repeated and daily calls from someone at "GC Financial." She
testified the caller(s) were rude and aggressive, referred to her as a "low life" and told her

1 she should make her son pay his debt. Her testimony is not just not credible, it is
2 incredible. It also contradicts the Plaintiff's own testimony. For example, Plaintiff
3 testified he never received any mail from GC, not even at his mother's residence; his
4 mother testified he received numerous pieces of mail from the Defendant at her house.

5 After Defendant's 30(b)(6) representative was deposed in this case, GC conducted
6 a search of its records to determine if and when telephone calls were placed by GC
7 collectors to any of the telephone numbers Plaintiff identified for "third parties." The
8 search included all outgoing calls from the three offices which handled Department of
9 Education accounts (Knoxville, Columbus and Tucson), and asked to identify calls
10 placed between January 1, 2008 and July 1, 2008, to any of the numbers identified by the
11 Plaintiff for third-parties. Between that time period, no calls were made by GC to 480-
12 962-5340 – Plaintiff's mother's telephone number. Two calls were placed to the
13 telephone number identified as Mr. Nichols' son Jordan's phone – one with no answer
14 and the other of a few seconds in duration. Mr. Nichols' testimony on GC's contact with
15 Jordan was only that Jordan told him either "GC called" or "call the man from GC." See
16 Paul Grover Affidavit attached to Defendant's Statement of Facts in support of
17 Defendant's MSJ at ¶¶12 through 14 and Defendant's Statement of Facts at ¶¶29, 30.
18 Mr. Nichols' testimony on this alleged contact is inadmissible hearsay, but even if a GC
19 collector did telephone his son's cell phone and did leave a message for Plaintiff to call
20 "[name] at GC," that does not impart improper information about the debt.

21 There simply is no evidence in the record from which a reasonable jury could find
22 that GC had unauthorized contact, in violation of the FDCPA, with third-parties relating
23 to Mr. Nichols' debt. The Plaintiff's motion for summary judgment on this count should
24 be denied and Defendant's motion for summary judgment granted.

1 **D. Plaintiff has not established that GC violated § 1692c(c) by continuing**
2 **to communicate with Plaintiff in an effort to collect the subject debt**
3 **following explicit notice from Plaintiff to cease and desist such**
4 **communication.**

5 As argued above and in Defendant's own motion and statement of facts, GC never
6 received any notice from Plaintiff (or anyone on his behalf) to cease and desist collection
7 communications with him until Mr. Meyers' July 1, 2008 letter arrived at Defendant's
8 office on July 8, 2008. GC's 30b6 representative testified that GC never received any
9 cease and desist communication from Mr. Nichols prior to that letter, and Plaintiff
10 acknowledged in his deposition testimony that he has no evidence to prove otherwise.
11 Mr. Nichols' sole argument on this issue is his implication that the Defendant's Account
12 Detail Listing is, on this point, unreliable or incomplete. His argument is not supported
13 by any evidence of record; at best it is hopeful speculation.

14 The totality of the evidence here amply demonstrates that the Defendant's
15 Account Detail Listing contains a thorough record of all Defendant's collection activity
16 with respect to Mr. Nichols' account. GC documented when, what, and where it mailed
17 correspondence to Mr. Nichols; its collectors noted the details of telephone conversations
18 it had with him, including what numbers it called to reach him and when. The Defendant
19 recorded when it received correspondence from the Plaintiff and what that
20 correspondence said, and what measures it took as precautions against contacting him in
21 violation of his explicit direction. When the collectors spoke with someone other than
22 Mr. Nichols, those contacts were noted in the Account Detail Listing as well, including
23 the number the collector called.

24 The detailed collection notes show 1) Mr. Nichols told Defendant, for the first
25 time on June 27, 2008, that it should not contact him at his workplace; 2) GC did not
26 contact Plaintiff at his place of employment after June 27, 2008; 3) GC received
correspondence from Plaintiff's lawyer for the first time on July 8, 2008, instructing GC

1 to cease collection communications with Mr. Nichols; and 4) GC complied with that
 2 cease and desist letter. Mr. Nichols has not and cannot controvert these facts with any
 3 competent evidence.

4 **E. The evidence of record demonstrates that GC in fact timely provided**
 5 **Plaintiff with the validation notices required by § 1692g.**

6 Mr. Nichols claims that GC failed to provide him with the information and notices
 7 required by the FDCPA, § 1692g. In fact, the first collections activity taken by GC with
 8 respect to Mr. Nichols was to mail a letter to him (Form Letter 30A) that included all the
 9 information required by the Act. *See* Grover Affidavit and its Exhibits G-1 through G-3.
 10 The Defendant's compliance with this FDCPA requirement is established by the Account
 11 Detail Listing and Mr. Grover's testimony, which is consistent with the collection record.
 12 The Plaintiff's claim that he "did not get" Letter 30A or any of the Defendant's
 13 subsequent mailings is belied by his own mother's testimony. More importantly,
 14 Defendant does not have to prove that the Plaintiff received those letters, where it has
 15 established that it sent them, and when, where, and what those letters said.

16 In short, Mr. Nichols cannot dispute that GC mailed all three letters to him at 1041
 17 West Harvest Street, Mesa, Arizona and cannot dispute that the letters comply with the
 18 Act. GC has adequately demonstrated that it provided the required information to Mr.
 19 Nichols in its initial collections communication to him and again thereafter. Plaintiff's
 20 motion on this count should be denied, and the Defendant's granted.

21 **III. CONCLUSION.**

22 Mr. Nichols has yet to produce evidence sufficient to support the allegations in his
 23 Complaint and Motion for Summary Judgment. The Plaintiff had no facts to support the
 24 suit when it was filed, and the expensive discovery he has conducted has failed to
 25 produce any admissible, credible evidence to support his claims. The Plaintiff's motion
 26

1 for summary judgement should accordingly be denied, and the Defendant's cross-motion
2 should be granted.

3 DATED this 10th day of August, 2009.

4 HINSHAW & CULBERTSON LLP

5 /s/ Victoria L. Orze
6 Victoria L. Orze
7 Attorneys for Defendant

8 **CERTIFICATE OF SERVICE**

9 I certify that on the 10th day of August, I electronically transmitted the attached
10 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a
11 Notice of Electronic Filing to the following CM/ECF registrants:

12 Marshall Meyers, Esq.
13 mmeyers@attorneysforconsumers.com
14 Weisberg & Meyers, LLC
15 5025 North Central, Suite 602
16 Phoenix, Arizona 85012
17 Attorneys for Plaintiffs

18 By /s/ Anne Lockwood